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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 5161

PACIFIC FAR EAST LINE, INC., *Petitioner,*

vs.

JONES STEVEDORING CO., *Respondent.*

Petition for a Writ of Certiorari

To the United States Court of Appeals for the Ninth Circuit

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To the United States Court of Appeals for the Ninth Circuit

Petitioner Pacific Far East Line, Inc. prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit rendered in this case on June 2, 1965.

OPINION OF THE COURT OF APPEALS

The District Court did not write an opinion.

Its findings of fact and conclusions of law are contained in the Record, Vol. I. The opinion of the Court of Appeals for the Ninth Circuit is reported at 346 Fed 2nd 642; also quoted in Appendix A, page 1.

JURISDICTION

The judgment of the Court of Appeals was entered on June 2, 1965. The jurisdiction of this Court is invoked under 28 USC § 1254(1).

QUESTIONS PRESENTED

One. Whether a stevedore who has agreed to perform stevedoring services on a vessel in loading bulk grain has fulfilled its warranty to do the job in a workmanlike manner, and with reasonable safety, and expressly by contract in a "careful manner"; when he adopts, i.e. uses, without compulsion to do so, a straight portable wooden ladder found leaning against the coaming of a deep tank hatch with the foot on the steel bottom of the tank without first ascertaining by examining the ladder, and particularly the lashings, whether the ladder was so secured that it could be used with reasonable safety.

Two. Whether, if the ladder was in fact not well secured, failure to secure the ladder, or use other reasonably safe means available for descending into the tank was a failure to fulfill the warranty of doing a workmanlike job.

Three. Whether the essential findings of fact (which are actually mixed findings of fact and conclusions of law) of the District Court and of the Court of Appeals are "clearly erroneous"; or should this Court decide that there is sufficient reason for a ruling that the Court has the "definite and firm conviction that a mistake has been committed."

STATUTES INVOLVED

This action is for indemnity and it is brought under the General Maritime Law; no statute is involved.

STATEMENT OF THE CASE

This matter being maritime in nature, the jurisdiction of the District Court was invoked under 28 U.S.C., Section 1333(1).

Respondent Jones Stevedoring Co. was engaged in loading safflower seed in bulk on Pacific Far East Line's vessel, the *Keystone Mariner*, at the Elevator Dock at Stockton, California, pursuant to a stevedoring contract with Pacific Far East Line. Ernest Pahland, a longshoreman, in the employ of Jones, was injured during the loading of safflower seed, a small oily grain, in No. 5 deep tank starboard side. Pahland was injured while descending a portable straight wooden ladder into the tank being loaded. He sued Pacific Far East Line in admiralty, alleging unseaworthiness of the vessel because a piece of iron had been torn partly loose from the coaming, on which he struck and injured his leg when the ladder slid to one side and down. He recovered $18,000 in damages and costs. Pacific Far East Line then brought an indemnity suit against Jones Stevedoring Co., claiming reimbursement plus necessary costs and attorneys' fees expended in defending the suit. The total amount involved was found to be $22,358.67. Finding 5. R. Vol. I, 38.

The statements of fact which follow are proven by ample and uncontradicted testimony:

1. The ladder and lashings could be easily observed at close range;

2. The ladder was not lashed in such manner that it could not slip sideways and down; and in fact it did slip when Pahland was descending;

3. The stevedore knew that the foot of the ladder was on an iron deck made slippery by oily safflower seed which was being scattered during stowing with a trimming ma-

chine placed in the hold; R. Vol. II, p. 96 and 97. (All references to Vol. II unless otherwise indicated).

4. The sliding sideways and out at the foot, caused Pahland to strike and injure his leg against a piece of iron which had been torn partly loose from the hatch coaming; R. 86.

5. That it was not customary to use a portable straight ladder for the purpose, and not necessary;

6. That it was not necessary to use any portable ladder at all;

7. That, if the stevedore deemed it desirable to use any ladder, he should have used a Jacob's ladder which can be drawn up by hand from time to time as the hold filled with bulk seed; R. 83, 141.

8. That the forward hatch of the deep tank starboard side was covered, making temporarily the ship's permanent iron ladder unavailable; R. 141.

9. That the ship's permanent iron ladder could easily have been made usable by lifting the cover from the forward hatch starboard side of the starboard tank, which was the tank being loaded.

10. That the cover making the permanent ladder in the starboard tank not usable was put on by the stevedore.

Jones had during the afternoon of the day of the accident stevedored the vessel at berth No. 9 which involved discharging cargo from the two tanks and then cleaning them to fit them to receive safflower seed at the Elevator Dock,[1] a sailing distance within the harbor of about half an hour.[2] Loading actually commenced at the Elevator Dock at 2000 (8 p.m.) according to the ship's log and was completed at 2300 (11 p.m.).[3] The accident happened between 10:00 and 11:00 p.m.[4] that evening. Pacific Far East Line did not

[1]R. 163 and 164. [2]R. 164. [3]R. 172. [4]Calculated, R. 132.

know that Pahland was injured until suit was filed several months later.[5] The injury was not reported to the ship's watch officer, Mr. Coombes; and, there was no entry in the deck log where it was the practice to make entry when any such accident is reported.[6]

Jones loaded this seed in bulk from an elevator located on shore through a spout[7] after placing in the tank a heavy machine, called a trimmer, which had a revolving part to distribute the seed.[8] Two longshoremen to position, manipulate and guide this machine went into the hold.[9] About an hour later Pahland and another longshoreman were sent into the hold to relieve the other two men.[10] Pahland had commenced to descend the ladder and had gone down two or three rungs[11] when the ladder slipped sideways and out at the bottom causing him to lose his balance and strike his knee on the piece of iron which had been partly torn loose from the after hatch coaming causing injury.[12] The ladder was estimated by Pahland to have been 24 to 36 inches from the after coaming located on Pahland's right hand side when descending the ladder.[13]

Each of the deep tanks had as a part of the ship's structure a permanent iron ladder extending from top to bottom.[14] In the port tank the ladder was located in the after port corner;[15] in the starboard tank in the forward starboard corner.[16] The covers or lids had been put on by the stevedore, according to the walking boss.[17] The result was, with the cover on, the ship's permanent iron ladder could not be used while loading the starboard deep tank.[18]

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[5]R. 173. [6]R. 173. [7]R. 63. [8]R. 97. [9]R. 95. [10]R. 95. [11]R. 87. [12]R. 86 l. 22, 96 l. 14. [13]R. 129, 89. [14]R. 179. [15]R. 179 l. 23. [16]R. 179 l. 12. [17]R. 139 and 140. [18]R. 140 and 141.

The ladder adopted for use by the stevedore was leaning against the iron edge of the hatch (referred to as a coaming) at the top level of the starboard tank being loaded. The ladder extended a few feet above the deck level and many feet below, to the bottom of the starboard deep tank.[19] There was not any direct evidence introduced as to when or by whom this ladder was placed.[20] However, it seems very likely that it was placed by the stevedore because this tank was discharged and then cleaned by the stevedore; and Jacobson, the walking boss, testified that the lids or covers were placed by the longshoremen on the forward hatches of both tanks.[21] Up until that time the permanent iron ladder in the starboard tank was usable. That the stevedore *voluntarily* adopted and used the ladder as a means of descending into the tank is not questioned.

Pahland approached the ladder from the left side and as he took hold of the top of the ladder which extended above the deck he saw attached to the left hand side rail a single line extending upward at about a 45° angle[22] to the ship's bulkhead approximately three feet away horizontally.[23] He could not say whether there was any other line or other means used to secure the ladder.[24] He did not examine the ladder further to see whether or how, if at all, it was lashed in any other way. The most he could say was that he assumed it was all right because other longshoremen (no doubt the two who preceded him into the deep tank) had used the ladder.[25] He further stated that when he came out of the tank he thinks he would have lashed it had it needed such at that time.[26] However, common sense tells us that when a ladder slipped sideways and down as this one

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[19]R. 88. [20]R. 112. [21]R. 139 and 140. [22]R. 92. [23]R. 118. [24]R. 103, 104. [25]R. 103. [26]R. 104.

did it would tend to tighten up the lashings; and, further, when he came up, which would be at the end of the second shift, the lower part of the ladder was undoubtedly stabilized because its foot would be under several feet of grain. The total time in loading both tanks was three hours, as the log book indicates.[27]

The undisputed testimony is that the proper way to lash a ladder in such position is to tightly secure it with two lines, one line at about the level of the hatch coaming and to attach another line to the other side so that there would be a sort of bridle to prevent the ladder from slipping sideways, or downward.[28] There is no testimony that the ladder was secured in any way at the bottom of the deep tank, where it rested on the slippery deck; or that it was steadied by either man already in the tank. And, the uncontradicted testimony is that such a ladder is not used for such purpose.[29]

The stevedore after loading the port tank on the offshore side shifted the heavy trimmer into the starboard tank by raising it with the ship's gear out of the first tank and lowering it into the second, where the accident occurred.[30] There is also uncontradicted testimony that the permanent iron ladder could have been easily and quickly uncovered with the ship's gear, then in place.[31]

THE WRIT REQUESTED SHOULD BE ISSUED FOR THE FOLLOWING REASONS:

There is doubt as to whether the precise question of law presented, as shown by the statement set out above, has been ruled upon by this Honorable Court; and, it seems not to have been previously decided by the Court of Appeals for the 9th Circuit, or any other Court of Appeals, so far as we have been able to ascertain.

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[27]R. 172. [28]R. 78, 136. [29]R. 65, 143. [30]R. 93. [31]R. 140.

It seems also, as indicated by lower court decisions, there has been misapprehension of this Court's declarations as to what the law is in this fast developing branch of the law, i.e. the obligation of a stevedore to an operator of a merchant vessel under various conditions. For these reasons this Court has issued writs. Also, there is very little law, as to what the obligation of the shipowner is to the stevedore. In the instant case it is contended by respondent and the findings of fact so indicate that there was obligation on the part of the shipowner to give notice to the stevedore that the ladder was inadequate or dangerous; finding 9 reads:

> "9. That respondent, Jones Stevedoring Company, received no notice at any time prior to any alleged accident or injury to said Ernest Pahland that a certain ladder involved and upon which Pahland descended into the lower hold was inadequate or dangerous;"

Because of the above factors and because in truth the law has been misconstrued by the two lower courts involved here as to what the obligation of the stevedore is in circumstances of this kind, the petition should be granted. It is very clear also that the true findings of fact are "clearly erroneous" and in fact completely unsupported by testimony of any probative value.

Most of the members of this Court have participated in the decisions in this fast developing branch of the law, and particularly the obligation of a stevedore to the operator of a merchant vessel under various conditions. But for the convenience of the Court the more recent cases decided will be cited and the rulings and supporting facts briefly analyzed in some instances.

But it seems appropriate to first deal briefly with the findings of fact.

The Findings of the Lower Courts Determinative of Respondent's Liability Are Clearly Erroneous.

The essential findings of the District Court and those of the Court of Appeals are completely at variance with the uncontradicted testimony; and justify a finding by this Court of a "definite and firm conviction that a mistake has been committed."[32]

The Court of Appeals has added a finding which cannot be properly said to be a finding of the District Court. It reads:

> "We conclude from that reading (of the record) that ample evidence exists to support the district court finding that the condition of the ladder was not a proximate cause of Pahland's injuries." Reference is made to Finding 13, Tr. 40. P. 3 of court's opinion.

There is no such precise finding in 13. There is only what may be described as a blanket finding, which is really a mixed finding of fact and law. That finding reads:

> "13. That there was no evidence of any kind adduced showing that respondent, Jones Stevedoring Company's actions or failure to act were a proximate cause of the alleged injury to the said Pahland."

The conclusion of the Court of Appeals is completely unfounded and the same of course applies to District Court's finding 13, and is refuted for the following reasons:

1. Because the pre-trial order of the District Court signed by Judge Oliver J. Carter reads as follows:

> "(b) Respondent's version of the events is as follows: * * * In order to get into the deep tank on the starboard side, Pahland used the wooden ladder and while so doing, *it slid or slipped and Pahland lost his balance,* striking a metal projection (a pipe

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[32] *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395.

guard), which had been bent out of place by the ship's crew *or some previous stevedore* so as to stick out into the tank." R. Vol. I, 24 of the Court's pre-trial order. Emphasis added.

2. Because the uncontradicted testimony of Pahland, on cross-examination was as follows:

BY MR. SIKES.

* * * * * * *

"Q. Now, this ladder, can you now tell us whether it slipped or shifted or fell, *or just how it was that there was a movement on which you hurt your knee?*

A. Do you mean could I tell you what kind of movement it was?

Q. Yes, what happened to the ladder? Can you tell us?

A. Well, look, I was very interested in holding on. I was 10, maybe 8 feet above the steel deck, and I was more interested right then in having both hands than I was anything else.

I would say that the *ladder shifted down the coaming and maybe slid in the hold a little bit.*

Now, I weigh 230 pounds. When I am on something that is moving about* the steel deck, I don't feel very secure." R. 102, 103. (*corrected by court reporter to "above".)

3. Because if there had been any such contention by Respondent, or if Respondent thought such a finding was valid it would have been set out in precise language in the findings of the District Court; which were prepared by Respondent and adopted in toto by the Court.

See also Pahland's testimony on this question set out in Appendix B.

The Court then proceeds to state that appellant had not sufficiently established its claim that "Jones Stevedoring

Company failed to do its stevedoring operations in a workmanlike manner or with reasonable safety." Reference is to Finding 12, Tr. 39-40.

The relevant part of Finding 12 reads:

> "12. * * * * that there was no evidence of any kind adduced showing that respondent, Jones Stevedoring Company, failed to do its stevedoring operations in a workmanlike manner or with reasonable safety;"

That also is a blanket finding and is more a conclusion of law. A review of the undisputed testimony clearly shows the contrary to be true.

The Court of Appeals also states:

> "The testimony of Pahland himself raises serious doubt that the ladder ever slipped" citing R. 86-87, 91, 102, 120, "or that the ladder was improperly fastened with only one line" citing R. Tr. 87-91, 99, 103-04, 120.

This was apparently to support its conclusion that proximate cause was not proven.

In view of Pahland's testimony quoted above and that quoted in Appendix B such a conclusion is completely erroneous. There cannot be any doubt the ladder slipped and slid sideways causing Pahland to strike his knee.

As to the evidence in respect to whether the ladder was improperly fastened with only one line, the most that can legitimately be said as to Pahland's testimony is that he assumed it was all right for several invalid reasons but he never actually looked to ascertain, or examined to see whether, there was any *other fastening* or lashing.

Pahland testified:

* * * * * * * *

> "Q. Where was it lashed, what part of the ladder?
> A. There was a lashing around one of the uprights and to the reefer bulkhead.

Q. To the uprights. That's one of the side rails?

A. That the rungs are nailed to and lashed from the upright on the ladder to the refrigerator. Those refrigerators have a bulkhead there and I wouldn't say whether it was pad eye or hand roll, but it was lashed to something on the refrigerator bulkhead." Pahland R. Tr. 88, 89.

He knew definitely on the side of the ladder where he came up there was a lashing attached to the upright, which was the forward part of the ladder.[33] The line ran "at an angle high on the reefer bulkhead and inclining down to the ladder." "I would say maybe a 45-degree angle." R. 92.

On cross-examination Pahland further testified:

"A. I don't get that question.

Q. Yes. You knew that there was one lashing and there may have been more lashings on that ladder; isn't that right?

A. Well, I knew there was one lashing because I had to put my hand on it to go by it. I am pretty sure that no one would lash a ladder on one side. That is, *I haven't seen many people do that.*" R. 103.

The District Court found, in Finding 12, that "Jones Stevedoring Company did not know of the presence or existence of the said protruding steel pipe guard at any time prior to the alleged injury to Pahland."

True, there is no direct evidence that they did, but there is evidence that they may have, and it is incredible that the Stevedore's men working in that vicinity as long as they did would not know of it. They first lowered the trimming machine in the tank immediately alongside the tank where the injury occurred, filled that tank, and then lifted the trimming machine out of it and lowered it in the second tank.

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[33] R. 119.

Also, two longshoremen had already gone down the ladder before Pahland started down. Furthermore, if it existed, when they were unloading and cleaning that same tank, they must have seen it. Proof that they did not know of it, if such was the fact, was in the hands of the Stevedore through his workmen, but none was offered. Circumstantial evidence is usually more reliable. See *Weyerhaeuser* case, *infra*.

Pahland testified on that point as follows:

> "Mr. Sikes: Q. You didn't see this steel thing that you hit your knee on? You didn't see that before your accident, did you?
>
> A. *I may have seen it.* That is, I don't have a recollection of it." R. 104

The Court stated that there is ample evidence to support the District Court's finding that the condition of the ladder was not a proximate cause of Pahland's injuries. Pahland was the only witness who gave any testimony on the point and his testimony very definitely shows that the ladder slid to one side and down causing him to strike the piece of iron involved. He testified that he "assumed" the ladder was safe because two longshoremen preceded him; and also that he thought and concluded it was safe after merely looking at the single line reaching up at a 45° angle to a bulkhead that in and of itself was plainly and completely insufficient to keep the ladder snug against the coaming and to prevent it sliding either sideways or down. In this regard he testified on cross-examination:

> "Q. Yes. You knew that there was one lashing and there may have been more lashings on that ladder; isn't that right?
>
> A. Well, I knew there was one lashing because I had to put my hand on it to go by it. I am pretty sure that no one would lash a ladder on one side. That is, *I haven't seen many people do that.*" R. 103

Such testimony has no probative value, and is contrary to direct factual testimony given by Pahland.

Other important testimony has been quoted or referred to in Appendix B.

The same is true of the Court of Appeals' statement that the

> "• • • *sole* proximate cause of the accident and the longshoreman's injuries was the unseaworthiness of the vessel caused by the bent steel guard." App. A. p. 4 i.e., it is wholly unsupported by the evidence.

It is significant that there was no precise finding by the District Court as declared by the Court of Appeals; it is only the Court of Appeals' conclusion from Finding 12, which reads in part as follows:

> "12. That the certain protruding steel pipe guard *alleged by Pahland to be a cause of his injury* had not been bent, secured, placed or handled in any respect by Jones Stevedoring Company, respondent; • • •" Emphasis added.

The finding then goes on to state that Jones did not know of the presence of the piece of steel pipe guard that was sticking out. The District Court must have meant that although Pahland stated what the cause of the accident was, Jones was not responsible for the condition of the guard and should not be held responsible. It may be stated at this juncture that the only testimony as to the knowledge of the stevedore of the piece of steel was given by Pahland who simply said that he *may have seen it.*[34]

The District Court also found (Finding 12) that

> "• • • Jones Stevedoring Company did not know of the presence or existence of the said protruding steel pipe guard at any time prior to the alleged injury to Pahland."

[34] R. 104.

The evidence reviewed above and that quoted in the Appendix together with other parts of the record clearly show that there are abundant grounds for a ruling by this Court:

1. That the ladder slid sideways causing Pahland to strike his knee and be injured;

2. That this was brought about by the fact that the ladder was not properly secured;

3. That examination by the stevedore would have disclosed this condition.

4. That the use of the ladder brought the unseaworthiness of the vessel into play in respect to the torn piece of iron on the coaming; and it also brought into play the danger involved in using the insufficiently lashed ladder.

It is Petitioner's position, irrespective of the fact that no examination was made as it should have been, that the stevedore by selecting the ladder, in the condition it was in, warranted its fitness for the use to which it was put. This will be adverted to below where the decisions of this Court and others are reviewed.

The Law Applicable Requires a Reversal of the Decision of the Court of Appeals.

In the case of *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315, this Court stated for the guidance of the Court of Appeals:

> "Subsequent decisions have made clear that the stevedore's obligation to perform with reasonable safety extends not only to the stowage and handling of cargo but also to the use of equipment incidental thereto, *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563, *including defective equipment supplied by the shipowner.*" pp. 319, 320. Emphasis added.

In the *Weyerhaeuser* case the circumstances were quite similar to those of our case. There a longshoreman was injured by a piece of board falling off of a defective winch driver's shelter which had been put on by the employees of the stevedore in New York and allowed to remain on board the ship by the ship operator during the voyage from New York to Boston and was used by the same stevedore at Boston. The record is silent as to under what circumstances the shelter was made available to the stevedore's men in Boston; but it is clear that they adopted it for use in discharging the vessel at Boston. The Court remarked:

> "We believe that respondent's contractual obligation to perform its duties with reasonable safety related not only to the handling of cargo, as in *Ryan,* but also to the use of equipment incidental thereto, such as the winch shelter involved here." p. 567.

Waterman Co. v. Dugan & McNamara, 364 U.S. 421, was a typical case of injury to a longshoreman, settlement of claim by the shipowner and third party action against the stevedore, except that there was no privity of contract between the shipowner and the stevedore. The shipowner admitted unseaworthiness of the vessel because of improper stowage of cargo which was loaded in the Philippines several weeks earlier, but claimed that the "direct, proximate, active and substantial cause of the accident" was the stevedore's "failing to perform the contracted stevedoring services in a safe, proper, customary, careful and workmanlike manner" which had brought the existing unseaworthy condition into play.

After deciding that privity of contract was not necessary the Court said:

> "This warranty of workmanlike service extends to the handling of cargo, as in *Ryan*, as well as to the use of equipment incidental to cargo handling, as in *Weyerhaeuser S. S. Co. v. Nacirema Co.*, 355 U.S. 563. The warranty may be breached when the stevedore's negligence *does no more than call into play the vessel's unseaworthiness. Crumady v. The J. H. Fisser*, 358 U.S. 423, 429." p. 423. Emphasis supplied.

It is noteworthy also that the Court there said in referring to the question involved:

> "But the fact is that this bridge was crossed in the *Crumady* case."

The significance of the last quotation is that it seems to have been difficult for some of the lower courts to get the full impact of the rule laid down by this Court for guidance. There was clear error made in the instant case and it is respectfully suggested that it is necessary to further define the rules to be followed.

In the *Crumady* case the stevedore brought into play the unseaworthiness of the vessel which was created by the owner. See also *Reed v. The Yaka*, 373 U.S. 410, in regard to which the Court stated in the *Italia*:

> "And last Term in *Reed v. The Yaka*, 373 U.S. 410, we assumed, without deciding, that a shipowner could recover over from a stevedore for breach of warranty even though the *injury-causing defect was latent and the stevedore without fault.*" p. 320. Emphasis added.

In *Smith v. Jugosalvenska Linijska Plovidea*, 278 F.2d 176 the Court of Appeals reversed the lower court on a finding of the lower court that there was not any failure to do a workmanlike job. There the stevedore's safety man looked at ship's *permanent* iron ladder and noticed that it was not bolted. He *assumed it was* welded but it was not;

and, when used by a longshoreman the ladder swung out causing the workman to be thrown to the deck below. Testimony showed that both foreign and American ships often have such ladders welded. But the Court, after referring to the *Joachim* and *Weyerhaeuser* cases, held the stevedore had failed to do a workmanlike job and in so holding said in regard to the conduct of the stevedore's safety man:

> "In short, *he must not assume* that a safe condition exists when he has notice that such may not be the case; and his judgment is not vindicated by the fact that three men used the ladder without incident before the accident." Italics are the Court's. p. 181

The facts in that case in all important respects are quite like those in ours. A cursory observation of the ladder and lashings would have been sufficient to require examination; it was enough to alert the stevedore's employee. The case is similar to the instant case also because there, as here, longshoremen had preceded the man who was hurt down the ladder. That of course was not proof of anything; but one longshoreman could have steadied the ladder for the other one—one at the top when the first went down and the other at the bottom when the second man went down—which is a common practice. Pahland was a big man weighing 230 pounds.

It is the stevedore who is the expert, who has the last clear chance and who is in a far better position than the ship operator to prevent injury. This is so stated in the *Italia:*

> "• • • Oregon (the stevedore) was in a *far better position* than the shipowner to avoid the accident. The shipowner defers to the qualification of the stevedoring contractor in the *selection* and *use* of equipment and relies on the competency of the stevedore company." p. 323. Emphasis added.

The conclusion is inescapable that the stevedore was completely indifferent as to the sufficiency of the ladder and fastenings. This firmly fixes responsibility on the stevedore.

It seems clear that the same reasoning which impelled this Court in the case of *Waterman v. Dugan & McNamara* to grant a writ of certiorari is present here. There obviously the lower court did not get the full impact of the Court's prior decisions on the point involved. And, it is evident from a reading of the trial record in the instant case that the trial court not only did not get the full impact of this Court's decision in the *Italia* and earlier cases but indicated that there could not be any such law.[35] The Court of Appeals while apparently intending to follow the law as laid down by this Court did not properly apply it to the well established facts.

Failure to grant this writ would encourage other circuits to make like decisions contrary to the law in future similar cases. The foregoing decisions of this Court make it clear that a decision like the one involved in the instant case should be reversed in order to further clarify the law.

It may be added that there are several cases decided by this Court which require a stevedore to do its job in a workmanlike manner and with safety. It is not fatal to a claim for indemnity that the stevedore was not negligent.

This Court granted certiorari in the following cases:

Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315
Reed v. The Yaka, 373 U.S. 410
Waterman Co. v. Dugan & McNamara, 364 U.S. 421
McAllister v. United States, 348 U.S. 19

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[35]R. 8, 6.

where factual issues similar to those in the present case were passed upon by this Court.

In sum it is appellant's position:

One. That where a stevedore selects and uses equipment on a ship, no matter how it got there, the stevedore warrants its fitness, in the condition found, by using it without taking precautions.

Two. That in any event, it was the duty of the stevedore under the circumstances to examine the lashings of the ladder to ascertain whether the ladder was properly secured. This is particularly true because the stevedore in making use of the ladder did so at an unusual place in an unusual way, and under circumstances where grave risk was involved.

Three. That the uncontradicted testimony is that the stevedore's failure to properly secure the ladder brought the Vessel's unseaworthiness into play and all findings to the contrary by the lower courts are *clearly erroneous.*

CONCLUSION

For the reasons set out above, it is submitted that the petition for writ of certiorari should be granted.

Dated: San Francisco, California, August 27, 1965.

Respectfully submitted,

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(Appendices Follow)

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Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 19,557

Pacific Far East Line, Inc., a Corporation,
Appellant,

vs.

Jones Stevedoring Co., a Corporation,
Appellee.

[June 2, 1965]

Appeal from the United States District Court for the Northern District of California
Southern Division

Before: BARNES, KOELSCH and ELY, Circuit Judges

BARNES, Circuit Judge:

Longshoreman Ernest Pahland successfully concluded a libel against appellant for injuries sustained in the course of loading operations on appellant's ship. After judgment was entered in Pahland's favor, appellant brought this action against the stevedoring company for indemnification in the total amount of $22,227.48 (the sum of Pahland's judgment plus costs and attorney's fees). The present appeal in this admiralty matter arises from the decision of the district court rejecting appellant-shipowner's claim for indemnification.

The accident in question took place during appellee's loading operations of safflower seed on appellant's vessel.

Pahland's injuries were sustained as he descended one of the ship's ladders which was extended from the ship's deck into a deep storage tank. It is undisputed that the immediate cause of the injuries was a protruding piece of steel against which Pahland struck his knee in the course of his descent. This protrusion resulted in a finding that the ship was unseaworthy, but was the basis for permitting Pahland to recover from appellant in the principal action. In light of the strict liability that a shipowner assumes in maintaining his vessel in a seaworthy condition, *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960); *Rogers v. United States Lines*, 347 U.S. 984 (1954); *Petterson v. Alaska S.S. Co.*, 205 F.2d 478 (9th Cir. 1953), *aff'd per curiam* 347 U.S. 396, *reh. denied* 347 U.S. 994 (1954), there can be little doubt that the finding of liability in the principal action was proper. In the present action, however, a different legal standard must be applied. A stevedore impliedly warrants to its shipowner that it will perform its activities in a workmanlike manner, *i.e.*, it warrants "workmanlike service." *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964); *Weyerhaeuser S. S. Co. v. Nacirema Operating Co.*, 355 U.S. 563 (1958); *Ryan Stevedoring Co. v. Pan-Atlantic Corp.*, 350 U.S. 124 (1956). Additionally, by express contract, appellee in this matter warranted that:

> "Any and all work undertaken by the stevedoring company will be prosecuted with reasonable dispatch and will be done in a proper and careful manner. . . ."

If the stevedoring activities in the present situation resulted in a breach of these implied or express warranties, appellant has a right to indemnification notwithstanding a finding that appellant maintained its ship in an unseaworthy condition. This statement of the appropriate law is supported by the

recent Supreme Court decision in *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., supra,* which sought to resolve the conflicting precedents which had existed theretofore. The Supreme Court there made it clear that a shipowner possesses a right to indemnification against a stevedore who breaches his implied warranty of workmanlike performance, even if it is found that the shipowner has acted negligently and the stevedore has not. The Supreme Court issued the following pronouncements, which are binding on us in the present case:

> "[T]he absence of negligence on the part of a stevedore who furnishes defective equipment is not fatal to the shipowner's claim of indemnity based on the stevedore's implied warranty of workmanlike service" *Id.* at 318.
>
> "[T] he stevedore's obligation to perform with reasonable safety extends not only to the stowage and handling of cargo but also to the use of equipment incidental thereto . . . including defective equipment supplied by the shipowner . . . and . . . the shipowner's negligence is not fatal to recovery against the stevedore". *Id.* at 319-20.

Appellant here claims that the protruding piece of steel was not the only proximate cause of Pahland's injuries. It is appellant's contention that Pahland only struck the protruding piece because the ladder he was descending slid as the result of improper securing. Appellant argues that the stevedore was obligated to secure the ladder in a workmanlike manner and, by not doing so, must be held to indemnify the shipowner.

We agree with appellant's interpretation of the applicable legal principles. Adequate proof of an unworkmanlike performance by appellee in the use of the ladder in question

would entitle appellant to indemnification for breach of implied warranty. But fatal to appellant's cause is the inescapable fact that the evidence in the record does not sufficiently support appellant's construction of the relevant facts.

We have carefully read the record in its entirety. We conclude from that reading that ample evidence exists to support the district court finding that the condition of the ladder was not a proximate cause of Pahland's injuries (Finding 13, Tr. 40), and to support the finding that appellant had not sufficiently established its claim that "Jones Stevedoring Company failed to do its stevedoring operations in a workmanlike manner or with reasonable safety." (Finding 12, Tr. 39-40.) The Court below found the sole proximate cause of the accident and the longshoreman's injuries was the unseaworthiness of the vessel caused by the bent steel guard. Finding 12 (Tr. 39) establishes that appellee had nothing whatsoever to do with the bent steel guard and knew nothing of its existence prior to the accident.

The testimony of Pahland himself raises serious doubt that the ladder ever slipped (R. Tr. 86-87, 91, 102, 120), or that the ladder was improperly fastened with only one line (R. Tr. 87-91, 99, 103-04, 120). The burden of proof was concededly on appellant. (Reply Br. 14.) The doubt thus raised leads us to conclude that the findings of fact of the district court are not "clearly erroneous." This is the extent of our power to review the factual findings of the court below. Rule 52(a), Federal Rules of Civil Procedure. We are not of "the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

We *affirm*.

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In the United States District Court for the Northern District of California, Southern Division

In Admiralty

No. 28308

Pacific Far East Lines, Inc.,
a corporation,
Libelant

vs.

Jones Stevedoring Company,
a corporation, et al,
Respondents

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above matter having been tried before this Court, the Honorable Lloyd H. Burke presiding, on March 16th and 17, 1964, the Libelant being represented by Dorr, Cooper & Hays by J. T. Cooper, Esquire, and the Respondent being represented by Robert Sikes, Esquire, and the Court having heard all of the evidence and arguments thereon and each of the parties having submitted Post Trial Briefs, the Court, being fully appraised in the premises, finds and concludes as follows:

FINDINGS OF FACT

1. That on or about September 28, 1959, Respondent, Jones Stevedoring Company, pursuant to a contract in writing between said Respondent and the Libelant, Pacific Far East Lines, Inc., undertook to perform certain stevedoring services in connection with the loading of cargo on board the SS Keystone Mariner at Stockton, California;

2. That one Ernest Pahland was on September 28, 1959 an employee of Respondent working in the course and scope of his employment on said vessel SS Keystone Mariner;

3. That on or about March 11, 1960 the said Ernest Pahland filed suit against Libelant in the District Court of the United States for the Northern District of California in action No. 28012 claiming injury to himself on or about September 28, 1959 while engaged in said employment;

4. That notice of the pendency of said action was given by Libelant, Pacific Far East Lines, Inc. to Respondent, Jones Stevedoring Company and the defense of said action was tendered to said respondent who declined to accept the same;

5. That the said action No. 28012 was tried and resulted in a Judgment in favor of plaintiff, Ernest Pahland, in the sum of $18,000.00 plus $131.19 costs, which Judgment was satisfied by Libelant, Pacific Far East Lines, Inc.; that in the defense of said litigation Pacific Far East Lines, Inc. expended the reasonable sum of $977.48 in court costs and expenses of suit and the reasonable sum of $3,250.00 as and for attorneys' fees necessarily incurred therein;

6. That the stevedoring contract between Libelant, Pacific Far East Lines, Inc. and Respondent, Jones Stevedoring Company, contained the following language among other:

"Any and all work undertaken by the Stevedoring Company will be prosecuted with reasonable dispatch and will be done in a proper and careful manner and to the satisfaction of the Ship's Captain, Officers, Agents and /or Representatives of the Steamship Company."

7. That said stevedoring contract was in full force and effect at all times pertinent hereto;

8. That under the provisions of the said stevedoring contract the respondent, Jones Stevedoring Company, had the contractual obligation to perform its services under said stevedoring contract with reasonable safety and in a workmanlike manner;

9. That respondent, Jones Stevedoring Company, received no notice at any time prior to any alleged accident or injury to said Ernest Pahland, that a certain ladder involved and upon which Pahland descended into the lower hold was inadequate or dangerous;

10. That Jones Stevedoring Company did not at anytime lash, secure or place the said ladder where it was at the time of the incident claimed by the said Pahland;

11. That there was no evidence adduced that the ladder was lashed in any particular or certain manner at the time of the incident to Pahland;

12. That the certain protruding steel pipe guard alleged by Pahland to be a cause of his injury had not been bent, secured, placed or handled in any respect by Jones Stevedoring Company, respondent; that Jones Stevedoring Company did not know of the presence or existence of the said protruding steel pipe guard at any time prior to the alleged injury to Pahland; that there was no evidence of any kind adduced showing that respondent, Jones Stevedoring Company, failed to do its stevedoring operations in a workmanlike manner or with reasonable safety;

13. That there was no evidence of any kind adduced showing that respondent, Jones Stevedoring Company's actions or failure to act were a proximate cause of the alleged injury to the said Pahland.

14. That respondent, Jones Stevedoring Company, was not negligent, careless, unworkmanlike, improper, unsafe nor below the ordinary standards of stevedoring operations in any connection with either the said wooden ladder or the steel pipe guard or in any other respect relative to the stevedoring work going on on board the said vessel Keystone Mariner on or about September 28, 1959.

From the foregoing findings of fact, the Court concludes:

CONCLUSIONS OF LAW

1. That respondent, Jones Stevedoring Company, did not breach its implied contractual obligations to do the stevedoring services on board the SS Keystone Mariner on or about September 28, 1959 at Stockton, California, in a reasonably safe, workmanlike, competent and standard acceptable manner;

2. That libelant, Pacific Far East Lines, Inc., is not entitled to Judgment herein against Jones Stevedoring Company, a corporation, respondent;

3. That Jones Stevedoring Company, a corporation, respondent, is entitled to Judgment herein against libelant, Pacific Far East Lines, Inc., a corporation, together with costs.

Dated this 12 day of May, 1964.

LLOYD H. BURKE
United States District Judge

Not Approved as to form
pursuant to Local
Rule 21.
DORR, COOPER & HAYS
By JAY T. COOPER

Appendix B

I. Testimony of Ernest Pahland, the Injured Longshoreman.

Pahland's testimony on direct:

"Q. I want to know how far was this ladder from the coaming out of which stuck the piece of steel?

A. Oh.

Q. The coaming was to your right as you went down the ladder?

A. Yes. It seems to me like it was. I wouldn't want to say, bit (sic) it seems to me at least 24 inches or maybe 36 inches; something like that. This is four years ago." R. Vol. II, 128, 129.

If the ladder didn't move, how could Pahland have hit the bent piece of steel?

Testimony of Pahland during cross-examination by proctor for respondent:

"Q. Well, now, you don't know, then, whether there were other lashes or not. You don't know one way or the other, is that right, sir?

A. When—if there would not have been another lashing on it, I think I would have put one on when I came up." R. Vol. II, 104.

But when he came up after working his "shift", the lower part of the ladder must have been buried to a considerable extent in the seed. The loading of the deep tank took about an hour, R. Vol. II, 132, and at the time Pahland came up loading had continued for two shifts.

THE COURT: "Let me ask this question: How did you get hurt?

THE WITNESS: How did I get hurt? I was going down a ladder into the tanks, No. 5 tanks on the after end of No. 5 hatch.

MR. COOPER: Q. Go ahead.

A. Well, going down this ladder, I bumped my leg on a piece of steel sticking out from underneath the coaming of this vessel.

Q. What happened to the ladder when you were going down?

A. Well, it feels—I think the ladder shifted a little bit. There was a movement in the ladder.

Q. I see.

A. As I was going down.

Q. Which way did it move, do you remember that?

A. *It moved down and sideways. Moved down and aft.*

Q. "Aft" means toward the coaming?

A. Towards the after coaming.

Q. Where the piece of steel was?

A. Where this piece of steel was, right.

Q. How far had you gone down the ladder when this happened? How many steps or rungs had you gone down, one, two, three, four, five?

A. Well, I was down, I'd say, three or four rungs—that is, my feet were about on maybe the third or fourth rung below the coaming.

Q. That is when it slid to one side and out?

A. Yes." R 86-87

II. Testimony of George Jacobsen, respondent's walking boss.

Jacobsen's testimony on direct examination by Mr. Cooper:

"Q. I mean, who does the whole operation?

A. Who does the work?

Q. Yes.

A. The Stevedoring Company." R. Vol. II, 133.

* * * * * * *

"MR. COOPER: Q. Is it true of the position of the booms?

A. We position the booms.

* * * * * * *

"Q. Is it true with regard to the position of portable ladders?

A. We do that, unless somebody else has done it previously.

Q. If somebody else has done it previously or if you don't like the way it is, what do you do? Assume you don't like the way it is arranged.

A. If it was unsafe?

Q. Yes.

A. They would make it safe.

Q. They would?

A. Yes, sir, the gang would.

Q. Your gang would?

A. Yes." R. Vol. II, 134.

* * * * * * *

"THE COURT: Well, we have been talking about which is the more satisfactory means of getting into the hold.

"THE WITNESS: The permanent ladder is." R. Vol. II, 144.

Jacobsen further testified:

"Q. What is your recollection, if you have any, with regard to whether any of the lids were on when the loading was being accomplished?

A. I think we put the two forward lids on.

Q. And then what about the two after lids?

A. We left them off and put them on when we completed." R. Vol. II, 139 and 140.

* * * * * * *

"Q. Tell us what would be the proper way to secure a straight ladder extending from two or three feet up above the edge of the coaming down to the deck where safflower seed was being loaded.

A. Either tie it tight into a corner or tie it where it leads back so it can't go either way.

Q. That is, tie it in a kind of glider (corrected to bridle).

A. Yes.

Q. So it can't slide? At what level would you secure it?

A. As close to the coaming as you could get it.

Q. Would you do anything as a matter of precaution at the foot of the ladder if it wasn't secured down there?

A. If somebody was there, they would probably hold it, if it was shaky, or try to put it against something." R. Vol. II, 135 and 136

III. Testimony of Knude Kanstrupe, Master Mariner.

Kanstrupe testified on direct:

"Q. In your experience, Captain, did you ever see a straight ladder used in No. 5 deep tanks or any similar tanks on a vessel?

A. Not to my recollection, no." R. Vol. II, 65.

* * * * * * *

"Q. Well, assume that this ladder, for the purpose of the question, extends from the edge of the coaming at the lower reefer flat level down to the bottom of the 5 deep tank at an angle—this is the portable ladder, now like a straight carpenter's ladder—and you wanted to use it to go down—No, it was to be used to go down into the hold. How should it be secured?

A. As a matter of safety, it should be lashed right to the hatch coaming, and we also have the man at the foot of the ladder so it won't slide. It is very common practice.

Q. What is he at the foot of the ladder for?

A. Pardon me?

Q. What is he stationed at the foot of the ladder for?

A. To steady the ladder so the ladder doesn't slip.

Q. All right. Now, you mentioned lashing the ladder. How would—would it be proper, assuming that this

was lashed by one line extending from the ladder to the bulkhead in the general vicinity where the reefer door is located, at an angle of about 45 degrees from the ladder to the bulkhead, would you say that was the proper way to do it or not?

A. No. I would use two lines spreading out so the ladder won't slip either way." R. Vol. II, 77 and 78.